In the Supreme Court of the United States

OCTOBER TERM—1967

No. 465

ELISHA EDWARDS,
Petitioner,

vs.

PACIFIC FRUIT EXPRESS COMPANY,
Respondent.

Brief for Respondent in Opposition

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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September 28, 1967

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CITATIONS

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OPINIONS BELOW

There is no opinion in the District Court. The opinion of the Court of Appeals is set forth in Appendix B of the Petition (p. iii), and is reported at 378 F2d 54.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Are refrigerator car companies "common carriers by railroad" within the meaning of the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq.

NCR

CARD 3

STATUTE INVOLVED

The portion of the Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C. § 51 et seq. which is involved is the opening clause of § 51, which reads in part,

> Every common carrier by railroad . . . shall be liable in damages . . . .

STATEMENT

Petitioner Elisha Edwards, an employee of Pacific Fruit Express Company, was injured November 9, 1963, at Roseville, California. According to the Complaint, Edwards was injured while operating a "motor vehicle" on the premises of Respondent. (R. 1 through 3). Respondent Pacific Fruit Express Company is furnishing workmen's compensation benefits including medical care and hospitalization. (R. 37).

Complaint was filed November 24, 1965, alleging Respondent's status as a common carrier by railroad subject to the Federal Employers Liability Act (hereinafter sometimes referred to as F.E.L.A.). Shortly thereafter Respondent answered and filed a motion for summary judgment. (R. 10). The motion was supported by the affidavit of W. G. Cranmer, Assistant to the Vice President and General Manager of Pacific Fruit Express Company. The affidavit shows that Respondent Pacific Fruit Express Company is a refrigerator car company. Its business has two primary aspects: 1) It owns and rents to railroads a fleet of refrigerator cars and refrigerator trailers specially designed to hold perishable commodities, and 2) It furnishes protective services against heat or cold to commodities carried in the refrigerator vehicles. (R. 34) In brief, the affidavit shows that Pacific Fruit Express Company does not transport commodities, does not publish tariffs and does not issue bills of lading (R. 35). The affidavit shows that Pacific Fruit

Express Company does not directly or indirectly serve the shipping public, i.e. does not accept or receive commodities for transportation. (R. 35). It shows that Pacific Fruit Express Company has no system of tracks, no terminals, no rail motive power, etc., excepting only that it has a shop switch engine at Roseville, California and at Tucson, Arizona, and owns railroad tracks at those locations and at locations where it receives ice. (R. 34)

In opposition to the motion for summary judgment Petitioner offered a purported affidavit executed by an investigator for Petitioner's attorneys. This document asserted that the investigator had picked up certain advertising literature from the offices of Pacific Fruit Express Company and that the literature was attached to the affidavit. (R. 69) This so-called affidavit forms the main basis for Petitioner's extravagant and inaccurate characterization of Respondent's business.

ARGUMENT

I. There Is No Conflict of Decision.

Petitioner asserts the decision of the Court of Appeals conflicts with decisions of this Court and of other Federal and state courts. (Petition, p. 14).

Respondent submits that not only is the decision below not in conflict with decisions of this Court or of other circuits, but on the contrary the decision below is in accordance with the unanimous weight of authority, which holds that refrigerator car companies are not subject to the Federal Employers' Liability Act. There are no reported decisions with a contrary holding.

Petitioner asserts first that the decision below is in conflict with *Parden v. Terminal Railroad of Alabama Docks Dept.*, 377 U.S. 184; 84 Sup. Ct. 1207; 12 L. Ed 2d 233. A brief review of the *Parden* opinion will indicate the sole

question decided was as to the constitutional immunity of the State of Alabama. Accordingly, the *Parden* case is not a case which is "substantially indistinguishable" from the present case, and cannot represent a direct conflict. In addition, a reading of the briefs and opinion in *Parden* shows that the question of the Respondent's status as a common carrier by railroad was not challenged, and a ruling on that point was not necessary to the decision of the case. It cannot even be said, therefore, that the decision below represents a conflict with the reasoning of the *Parden* decision. The question posed here simply was not raised in *Parden*. Further, the *Parden* case involved a terminal railroad, i.e. a switching railroad which directly served on its own tracks with its own power and crews various docks and industries and physically interchanged cars with other railroads. As Cranmwer's affidavit shows, none of these factors are present in the business of Respondent, a refrigerator car company. The two situations are thus factually distinguishable.

Petitioner next asserts the decision below is in conflict with a line of cases which it designates as "the terminal company decisions." (Petition p. 18). The mere assertion that these cases deal with the activities of terminal railroad companies is enough to indicate they are factually distinguishable from the activities of refrigerator car companies. Thus, a fortiori there can be no conflicts between the two types of cases. As is shown hereafter, Congress and the courts have long recognized and accorded separate treatment to different areas of transportation activity which are peripheral to railroading. Petitioner offers no persuasive reason for overcoming this congressional and judicial recognition of differences, and in particular no reason is offered for assimilating the treatment of refrigerator car companies to that given terminal railroad companies.

Far from there being any conflict in decisions, the decision below is in accord with the prior decision of that court in *Gaulden v. Southern Pac. Co.*, 174 F.2d 1022 (9th Cir. 1949) which affirmed in a *per curiam* opinion the judgment of the District Court for the reasons stated in the opinion of the District Court, 78 F.Supp. 651 (N. D. Calif. 1948). The decision below is also in accord with that of the only other circuit to consider this question, the Third Circuit, in *Hetman v. Fruit Growers Express Co.*, 346 F.2d 947 (3rd Cir. 1965).

The decision below is in accordance with the only other reported decisions, those of state courts considering this question. These are:

1) *Aguirre v. Southern Pac. Co.*, 232 Cal. App. 2d 636; 43 Cal. Rptr. 73, and

2) *Moleton v. Union Pac. R. R. Co.*, 118 Ut. 107, 219 P.2d 1080, *cert. den.* 340 U.S. 932; 71 Sup. Ct. 495; 95 L. Ed. 672.

The judicial authority is thus unanimous, and not in conflict, to the effect that refrigerator car companies are not subject to the Federal Employers' Liability Act.

II. There Is No Unsettled or Important Question of Federal Law.

Firstly it should be noted this Court has previously declined to review this question in a case involving Respondent herein. *Moleton v. Union Pac. R.R.* 118 Ut. 107, 219 P.2d 1080, cert. den. 340 U.S. 932, 71 Sup. Ct. 495, 95 L. Ed. 672. In *Moleton* exactly the same question was raised, to wit: [whether]

> "The defendant Express Company at the time of plaintiff's injury was a common carrier by railroad in interstate commerce." (p. 1084)

The reference to "Express Company" is to Respondent herein, Pacific Fruit Express Company. Petitioner indicates

no changed facts or circumstances which invest the question with additional importance since the time of the *Moleton* decision.

Secondly, the law in this area has been well settled for many years. All the decided cases are adverse to Petitioner. The seminal case is *Gaulden v. So. Pac. Co.* 78 F.Supp. 651 (N.D. Calif.), and that decision is almost twenty years old. The cases relied upon by The Hon. Louis Goodman in the opinion in *Gaulden* (as holding that "the business of renting refrigerator cars to railroads or shippers and providing protective service . . . is not of itself that of a common carrier by railroad,") date from 1914 and are clear holdings within their fields. In the meantime:

> These employees have, during all of those years, been working under, and enjoying the benefits of workmen's compensation laws of California and of the other states in which P.F.E. operates (not the least of which benefits is compensation for all employment-induced health and accident casualties regardless of proof of negligence.) We would not lightly conclude that Congress, in the enactment of Section 55 of F.E.L.A., intended that the 4,000 employees of a large corporation now operating independently and legally and a non-railroad must suddenly be required to switch from the system of state workmen's compensation laws to the federal railroad employees system, a transfer inevitably fraught with hardship upon both employees and employer occasioned by readjustment. . . . . *Aguirre v. Southern Pac. Co.*, 232 Cal. App. 2d 636; 43 Cal. Rptr. 73.

III. The Decision Below Is Clearly Correct.

There are no significant factual changes in Respondent's operations from that shown in prior adjudications, notwithstanding Petitioner's attempts to make it appear otherwise. Petitioner asserts, for example, that Respondent "(c) holds itself out to the public as providing common carriage . . ."

(Petition p. 2). The basis for such an assertion appears to be the references to classified telephone directory listings set forth on page 10 of the Petition. This material is improperly offered in that it is not part of the record. Apart from that, listings in the yellow pages, which are obviously based on the phone companies' available classifications, are an insufficient basis for the assertion. From a factual standpoint the possibility of such a "holding out" is negatived by the showing that Respondent does not have the means of doing so, e.g. lacks certificates of public convenience, tariffs, bills of lading and all the other paraphernalia of common carriage. (R. 35) Petitioner's urgings as to other factors of Respondent's business involve similar corruptions of meaning, and by and large concern matters considered in prior adjudications and found to be not significant. As to the matter of owning tracks and switch engines at Roseville and Tucson, for instance, many large shippers, consignees and suppliers of rail equipment own intraplant systems of tracks and switch engines, yet are not subject to the F.E.L.A.

In the court below, in order to escape the impact of the *Gaulden* decision, Petitioner contended Respondent's operations were much different than that shown in *Gaulden*. (Appellant's Opening Brief pp. 10 and 12). Now Petitioner has abandoned that position and seeks to distinguish *Gaulden* on other grounds (Petition p. 15). Petitioner thus tacitly concedes that Respondent's business has not materially changed from that shown in prior adjudications (*Gaulden* et.al.) These adjudications uniformly hold that refrigerator car companies are not subject to the F.E.L.A.

More importantly, however, the history of the inclusion and exclusion of refrigerator car companies in the various transportation legislation shows that Congress never in-

tended this type of activity to be covered by the F.E.L.A. In brief, the history is this: In 1934 the Railway Labor Act, 45 U.S.C. § 151, was amended as to Section 1 to *specifically include* services "in connection with the . . . refrigeration or icing . . . of property transported by railroad." 48 Stat. 1185 (1934), 45 U.S.C. § 151. In 1937 Congress enacted the Railroad Retirement Act, 45 U.S.C. § 228a and the Railroad Retirement Tax Act, Internal Revenue Code of 1954 § 3231, incorporating a definition of the term "carrier" which *specifically included* companies performing services in connection with refrigeration or icing of railroad cars. The acts which preceded these two acts (and were held unconstitutional or were superseded by these acts) also specifically included refrigerator car companies as a distinct type of activity. In 1938 the Railroad Unemployment Insurance Act, 45 U.S.C. § 351, *specifically covered* companies performing services in connection with refrigeration or icing.

When the F.E.L.A. was amended, however, a different story ensued. In 1939 Congress amended the Federal Employers' Liability Act, 53 Stat. 1404. At that time it was proposed to broaden the coverage of the act to include express, freight forwarding, and sleeping car companies. S. Rep. 661, 76th Cong., 1st Sess. 2 (1939). This proposed amendment was defeated, thus disclosing congressional disinclination to extend the coverage of the F.E.L.A., although within the operating rail industry the coverage was considerably broadened. The fact that refrigerator car companies were not proposed to be included indicates the lack of any demand or expression of need for extension of the F.E.L.A. to this area of activity.

By contrast, in the Transportation Act of 1940, 54 Stat. 917 Congress added Section 20(6) to another major item of transportation legislation, the Interstate Commerce Act,

giving the Interstate Commerce Commission limited jurisdiction (for the first time) to inspect books and prescribe forms of account for refrigerator car companies. This amendment came after a train of authority which specifically held refrigerator car companies not to be subject to the Interstate Commerce Act. *Ellis v. Interstate Commerce Commission,* 237 U.S. 434; 355 Sup. Ct. 645; 59 L. Ed. 1036; *U. S. v. Fruit Growers Express,* 279 U.S. 363; 49 Sup. Ct. 374; 73 L. Ed. 739.

In summary, by amendment to the Railway Labor Act, and by original enactment in the Railroad Retirement Act, the Retirement Tax Act and the Railroad Unemployment Insurance Act, Congress specifically included refrigerator car companies within the scope of the legislation. Thereafter in the 1939 amendments to the F.E.L.A. Congress refused to extend coverage of that act to various activities closely associated with railroading. In 1940, after the F.E.L.A. amendments, Congress amended the Interstate Commerce Act to specifically confer limited powers over refrigerator car companies. This legislative history demonstrates Congress recognizes refrigerator car companies as a distinct type of activity and did not intend to subject them to the F.E.L.A.

Apart from Congressional intent, the unanimous weight of judicial reasoning agrees that it is not accurate to characterize refrigerator car companies as common carriers by railroad. These cases have previously been cited and it would serve no point to discuss each one. Each, however, expressly considers the question raised here and resolves it against Petitioner's position. *Gaulden v. So. Pac. Co.* 78 F. Supp. 651 is the key case. Petitioner seeks to avoid it by suggesting the question was not fully urged. This is refuted by the express and full consideration given by Judge Goodman commencing on page 654 of the opinion.

This Petition presents no new considerations, there are no conflicts in the decisions nor important or unsettled questions of federal law, and statutory history and unanimous judicial opinion show the decision below is clearly correct.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ALAN C. FURTH